FILED BY CLERK
AUG -5 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MARC MARTIN LEYBA, Petitioner.	2 CA-CR 2011-0144-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092742001

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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Tucson
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Marc Martin Leyba
Douglas
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Marc Leyba seeks review of the trial court's order summarily dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., in which he asserted the court had erred by imposing a prison term greater

than the presumptive. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Leyba was convicted pursuant to a plea agreement of possession of marijuana for sale and first-degree money laundering, both class two felonies. *See* A.R.S. §§ 13-2317(A), (E), 13-3405(A)(2), (B)(6).[1] The trial court sentenced Leyba to a five-year prison term for possession of marijuana for sale and an eight-year prison term for money laundering. As to the term for money laundering, the court found as aggravating factors Leyba's previous felony conviction, that the offense was committed for pecuniary gain, and "the sophistication of the operation." Leyba's prison term for possession of marijuana for sale is the presumptive term pursuant to A.R.S § 13-702(D). The prison term for money laundering, which the trial court described as an "aggravated" term in the sentencing minute entry, is three years greater than the five-year presumptive term but less than the maximum and aggravated terms provided by § 13-702(D).

¶3 Leyba filed a notice of post-conviction relief and a pro se petition for post conviction relief, arguing the trial court had erred by imposing the increased eight-year prison sentence for money laundering.[2] He asserted that, because his previous conviction was for a federal crime, the court could not use it to enhance or aggravate his sentence

[1]We refer to the current version of § 13-3405 because it is the same in relevant part as the version in effect when Leyba committed the offenses. *See* 2010 Ariz. Sess. Laws, ch. 194, § 6.

[2]Lebya stated in his notice of post conviction relief that he wished to raise a claim of ineffective assistance of counsel and, despite being informed at sentencing that he had a right to counsel in his post-conviction proceedings, that he did not wish an attorney appointed for the proceeding. His pro se petition for post-conviction relief did not include a claim of ineffective assistance of counsel.

and, as we understand his argument, that the remaining aggravating factors relied upon by the court were insufficient to support an aggravated sentence because they fell within the "catch-all" provision of A.R.S. § 13-701(D)(24). *See State v. Zinsmeyer*, 222 Ariz. 612, ¶¶ 24-26, 218 P.3d 1069, 1079-80 (App. 2009) (sentence beyond presumptive cannot be based solely on catch-all aggravator); *see also State v. Schmidt*, 220 Ariz. 563, ¶ 10, 208 P.3d 214, 217 (2009); *State v. Perrin*, 222 Ariz. 375, ¶ 9, 214 P.3d 1016, 1019 (App. 2009). He also argued the court had failed to consider mitigating factors presented at sentencing, and that he was entitled to 262 days of presentence incarceration credit.

¶4 The trial court granted relief on Leyba's incarceration credit claim, but otherwise summarily dismissed his petition. The court determined the eight-year prison sentence was proper because pecuniary gain was an enumerated factor under § 13-701(D)(6) and, although Leyba's federal conviction for possession with intent to distribute marijuana did not qualify as a previous felony under § 13-701(D)(11),[3] the court nonetheless properly could consider Leyba's criminal history under the catch-all provision in § 13-701(D)(24). And the court stated it had considered the factors presented in mitigation. Finally, the court noted that, because Leyba had agreed as part of his plea that eight years would be the minimum prison sentence imposed, if the

[3]The state noted at the change-of-plea hearing that a recent court of appeals decision "bar[red] the use of a federal prior as a sentencing enhancer." The state, presumably, was referring to *State v. Norris*, 221 Ariz. 158, ¶¶ 2, 10, 211 P.3d 36, 37, 39-40 (App. 2009), in which this court determined that a federal conviction for possession with intent to distribute marijuana was not a historical prior felony under former A.R.S. § 13-604. *See also* 2005 Ariz. Sess. Laws, ch. 188, § 1.

aggravating factors were improper, it would have imposed consecutive five-year prison terms for each of Leyba's convictions.[4]

¶5 On review, Leyba again argues that, because the trial court did not find at least two aggravating factors enumerated in § 13-701(D), it was not permitted to impose an eight-year sentence.[5] This claim is meritless. The court was not required to find two enumerated aggravating factors; pursuant to § 13-701(C), it had the discretion to impose an eight-year sentence on the basis of a single enumerated aggravating factor—in this case that Leyba committed the offense for pecuniary gain. *See* §§ 13-701(D)(6), 13-702(D). And, even assuming the remaining factors found by the court somehow were improper, the court made clear it nonetheless would have imposed at least an eight-year prison sentence. *See State v. Pena*, 209 Ariz. 503, ¶ 24, 104 P.3d 873, 879 (App. 2005) (sentencing error harmless if trial court would have imposed same sentence absent inappropriate aggravating factor).

¶6 As we understand his argument, Leyba also asserts that, because the state initially had alleged his federal conviction for sentence enhancement under A.R.S. § 13-703, it could not be used to aggravate his sentence regardless of the fact that he did not receive an enhanced sentence. *See* § 13-702(D). Even assuming Leyba's petition for post-conviction relief can be read fairly to have raised this claim below, he fails to

[4]After the trial court denied his petition for post-conviction relief, Leyba filed a motion to amend that petition raising additional arguments. The court denied that motion, and Leyba does not argue on review the court erred in doing so.

[5]To the extent Leyba's petition for review incorporates by reference arguments made in his petition for post-conviction relief, such incorporation is prohibited by Rule 32.9(c)(1)(iv).

support or adequately develop this argument on review. Accordingly, we do not consider it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument). And, because he did not raise them below, we do not consider Leyba's claims that his plea agreement was involuntary because he did not understand that the presumptive prison term for his offenses was five years and not eight, and that the court was required to find aggravating factors by clear and convincing evidence. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

¶7 For the reasons stated, although we grant review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge